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6 UNITED STATES DISTRICT COURT
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA
8 OAKLAND DIVISION
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10 PAMELA JAROSE, executor of the
11 ESTATE OF JOHN R. BRAUN,

12 Plaintiff,

13 vs.

14 COUNTY OF HUMBOLDT, a subdivision
15 of the State of California,

16 Defendant.

Case No: C 18-07383 SBA

**ORDER DENYING MOTION TO
MODIFY THE SCHEDULING
ORDER AND FOR LEAVE TO
AMEND THE PLEADINGS**

Dkt. 31

17 Plaintiff and Counter-Defendant Pamela Jarose, executor of the Estate of John R.
18 Braun (the “Estate”), and Defendant and Counter-Plaintiff County of Humboldt (the
19 “County”) sue each other to assign liability and/or recover costs for hazardous waste
20 cleanup at certain real property located in Eureka, California. The parties bring claims
21 under the Comprehensive Environmental Reponse, Compensation, and Liability Act
22 (“CERCLA”), 42 U.S.C. § 9601, et seq., and California’s Hazardous Substances Account
23 Act (“HSAA”), Cal. Health & Safety Code § 25300, et seq., as well as related causes of
24 action. Presently before the Court is the Estate’s Motion to Modify the Scheduling Order
25 and for Leave to Amend the Pleadings. Having read and considered the papers filed in
26 connection with this matter and being fully informed, the Court hereby DENIES the
27 motion, for the reasons stated below. The Court, in its discretion, finds this matter suitable
28 for resolution without oral argument. See Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

1 **I. BACKGROUND**

2 **A. FACTUAL BACKGROUND**

3 The instant action concerns hazardous waste contamination at and around certain
4 real property located at 411 J Street, Eureka, California (the “Subject Property”). First Am.
5 Compl. (“FAC”) ¶ 1, Dkt. 28. John R. Braun (“Braun”) previously owned the Subject
6 Property. Countercl. & Cross-Cl. (“Countercl.”) ¶ 2, Dkt. 14.¹ Upon Braun’s death in
7 January 2018, Pamela Jarose (“Jarose”) became executor of his Estate. Id. ¶ 2; FAC ¶ 6.

8 On or about July 23, 1993, a Judgment on Stipulation for Settlement and Entry of
9 Judgment (“Judgment”) was entered in County of Humboldt v. John R. Braun, Superior
10 Court of California, County of Humboldt, Case No. 93DR0195, approving the County’s
11 condemnation of the Subject Property and full compensation to Braun in the amount of
12 \$1,467,190 for the taking. FAC ¶ 9 & Ex. A (Judgment) at 1. The Judgment also sets forth
13 the “mutual rights, duties, and obligations” of the parties. J. ¶ 4 & Ex. A.

14 Among other things, the Judgment holds Braun responsible for “all costs of
15 hazardous waste cleanup originating on [the Subject Property]” J., Ex. A ¶ 4. This
16 obligation terminates upon certification by the Northcoast Water Quality Control Board
17 (“Board”) of (a) full compliance with an approved remediation plan and (b) satisfaction of
18 applicable regulations such that additional monitoring and/or cleanup is no longer required.
19 Id. ¶ 5. Braun was to complete the cleanup by January 1, 1994. Id. ¶ 6. If not completed
20 by that date, the County has the right to complete any remaining cleanup and seek
21 reimbursement from Braun for reasonable costs attendant thereto. Id. ¶¶ 10-11.

22 Regarding compensation, the Judgment requires the County to deposit \$1,209,690
23 into an escrow account for disbursement to Braun. Id. ¶¶ 1-2. It also requires the County
24 to deposit the remaining \$257,500 into an investment account. Id. ¶ 13. Pursuant to certain
25 terms, the Judgment authorizes withdrawals from the investment account to pay expenses
26 associated with the cleanup of the Subject Property. Id.

27 _____
28 ¹ Although the County characterizes its pleading as a “Counterclaim and
Crossclaim,” it alleges claims solely against Plaintiff.

1 **1. The Estate’s Allegations**

2 The County courthouse occupies property adjacent to the Subject Property. FAC ¶¶
3 12-13. At all times relevant to this dispute, the County has “owned, operated, maintained,
4 supervised, and/or controlled” a dewatering sump system in the courthouse basement. Id.
5 ¶ 13. The Estate alleges that operation of the system has transported hazardous substances
6 to previously uncontaminated areas. Id. ¶ 15. Specifically, the sump system has “illegally
7 released, discharged, and/or disposed of contaminated water to and from the storm drain
8 system,” which “flows toward Humboldt Bay without pretreatment.” Id. ¶¶ 19-20.

9 The Estate claims that the County’s operation of the courthouse sump system has
10 “exacerbated the contamination that was not foreseeable to Plaintiff, and any alleged
11 responsibility for such conduct was not intended to be included in the scope of the
12 Judgment.” Id. ¶ 23. According to the Estate, “the County’s negligence has interfered with
13 the terms of the Judgment and the cost to delineate and remediate the contamination at
14 issue has increased.” Id.

15 **2. The County’s Allegations**

16 The County alleges Braun partially performed or made promises to perform his
17 obligations under the Judgment but never fully satisfied the same. Countercl. ¶¶ 10, 13.
18 Although the Judgment contemplates completion of the cleanup by 1994, the County
19 permitted Braun “to extend the cleanup period in a manner that was cost efficient for [him]
20 as long as there was not any threat of action from the Board.” Id. ¶ 10. In May 2018, the
21 Board issued a directive to resume monitoring and corrective action at the Subject Property.
22 Id. ¶ 12. In July 2018, the County issued a formal written demand to the Estate for cleanup
23 of the Subject Property. Id. ¶ 14. The Estate has not accepted the demand. Id.

24 In addition to contaminating the Subject Property, “the hazardous waste from the
25 Subject Property has been, and is, migrating towards Humboldt Bay.” Id. ¶ 18. This
26 “groundwater plume” has contaminated adjacent property, including the courthouse. Id.
27 The County acknowledges that it operates a “passive” sump system at the courthouse and
28 that water received thereby is contaminated by the plume. Id. ¶ 19. However, the County

1 claims its sump system “does not actively extract contaminated groundwater, alter or
2 exacerbate migration of the plume, or contribute to groundwater or soil contamination in
3 surrounding properties.” Id. ¶ 20. The County “has been forced to incur the expense for
4 design, permitting, and installation of a treatment system for sump discharge.” Id.

5 **B. PROCEDURAL BACKGROUND**

6 On December 7, 2018, the Estate filed a Complaint against the County, alleging
7 causes of action for: (1) cost recovery under CERCLA; (2) contribution under CERCLA;
8 and (3) declaratory relief. Dkt. 1. The County answered on December 21, 2018. Dkt. 13.
9 It also filed a Counterclaim, alleging causes of action for: (1) breach of written contract;
10 (2) implied contractual indemnity; (3) contribution under HSAA; (4) declaratory relief
11 under HSAA; (5) declaratory relief; (6) public nuisance; (7) private nuisance; (8) cost
12 recovery under CERCLA; and (9) contribution under CERCLA. Dkt. 14. The Estate
13 answered the Counterclaim on January 10, 2019. Dk. 15.

14 In the meantime, on December 17, 2018, the Estate submitted a tort claim to the
15 County regarding this dispute. The County denied the claim on January 8, 2019. On
16 February 6, 2019, the Estate filed a Motion for Leave to File a First Amended Complaint,
17 wherein it sought to add causes of action for: (1) Contribution and Indemnity Pursuant to
18 HSAA; (2) Continuing Public Nuisance; (3) Dangerous Condition of Public Property; and
19 (4) Equitable Indemnity and Contribution. Dkt. 16. The Court granted the Estate’s motion.
20 Dkt. 27. On June 5, 2019, the Estate filed the operative First Amended Complaint.
21 Dkt. 28. The County answered the First Amended Complaint on June 17, 2019. Dkt. 30.

22 On May 29, 2019, the Court entered an Order for Pretrial Preparation, setting a
23 deadline of June 28, 2019, for the joinder of parties and to amend the pleadings. Dkt. 26.
24 On August 22, 2019, the Estate deposed the County’s Rule 30(b)(6) witness, Hank
25 Seemann (“Seemann”). Monroe Decl. ¶ 5, Dkt. 31-2. At the deposition, Seemann testified
26 that: (1) to his knowledge, the County has not obtained a permit to discharge water from the
27 courthouse sump system; and (2) the County released to Braun the funds set aside under the
28 Judgment for cleanup costs. On September 16, 2019, the Estate served on the County a 60-

1 day notice of intent to commence litigation under the Clean Water Act (“CWA”), 33 U.S.C.
2 § 1311, as required by 42 U.S.C. § 1365. Id. ¶ 6.

3 On November 6, 2019, the Estate filed the instant Motion to Modify the Scheduling
4 Order and for Leave to Amend the Pleadings. Dkt. 31-1. It seeks leave to file a Second
5 Amended Complaint to add: (1) Jarose as a plaintiff in her individual capacity; and (2) a
6 claim against the County for violation of the CWA. The Estate also seeks leave to file an
7 Amended Answer to the Counterclaim to add an affirmative defense of accord and
8 satisfaction. The County filed separate opposition briefs regarding the filing of an
9 Amended Answer to the Counterclaim (“Opp’n to Am. Answer”), Dkt. 35, and a Second
10 Amended Complaint (“Opp’n to Second Am. Compl.”), Dkt. 36. The Estate filed a single
11 Reply. Dkt. 40. The motion is fully briefed and ripe for adjudication.

12 **II. LEGAL STANDARD**

13 A motion for leave to amend the pleadings generally is governed by Federal Rule of
14 Civil Procedure 15(a)(2), which provides that a court should “freely give leave when justice
15 so requires.”² However, where, as here, a court has entered a pretrial scheduling order that
16 establishes a deadline for amending the pleadings and that deadline has passed, a party’s
17 ability to amend the pleadings is governed by Rule 16(b). Coleman v. Quaker Oats Co.,
18 232 F.3d 1271, 1294 (9th Cir. 2000) (citing Johnson v. Mammoth Recreations, Inc., 975
19 F.2d 604, 607-08 (9th Cir. 1992)).

20 Pursuant to Federal Rule of Civil Procedure 16(b)(3)(A), a court must enter a pretrial
21 scheduling order that limits the time to join other parties, amend the pleadings, complete
22 discovery, and file motions. “A scheduling order is not a frivolous piece of paper, idly
23 entered, which can be cavalierly disregarded by counsel without peril.” Johnson, 975 F.2d

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25 ² Five factors govern the Court’s determination as to whether leave to amend is
26 warranted under Rule 15(a): (1) undue delay; (2) bad faith or dilatory motive; (3) prejudice
27 to the opposing party; (4) futility of amendment; and (5) repeated failure to cure
28 deficiencies by amendments previously allowed. Eminence Capital, LLC v. Aspeon, Inc.,
316 F.3d 1048, 1052 (9th Cir. 2003) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).
Of these factors, prejudice “carries the greatest weight.” Id. “Absent prejudice, or a strong
showing of any of the remaining Foman factors, there exists a *presumption* . . . in favor of
granting leave to amend.” Id. (emphasis in original).

1 at 610 (quotations and citation omitted). Once entered, a scheduling order “may be
2 modified only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4).

3 “Good cause” may be shown where pretrial deadlines “cannot reasonably be met
4 despite the diligence of the party seeking the extension.” Zivkovic v. S. Cal. Edison Co.,
5 302 F.3d 1080, 1087 (9th Cir. 2002) (quoting Johnson, 975 F.2d at 609). Although a court
6 may consider any prejudice to the party opposing modification of the scheduling order, the
7 “good cause” standard focuses on the diligence of the moving party. In re W. States
8 Wholesale Nat. Gas Antitrust Litig., 715 F.3d 716, 737 (9th Cir. 2013) (citing Johnson, 975
9 F.2d at 609). If the party seeking to modify the scheduling order has not been diligent, the
10 court’s inquiry should end and the motion should be denied. Zivkovic, 302 F.3d at 1087
11 (citing Johnson, 975 F.2d at 609).

12 **III. DISCUSSION**

13 The Estate moves for leave to file a Second Amended Complaint as well as an
14 Amended Answer to the County’s Counterclaim.

15 **A. PROPOSED SECOND AMENDED COMPLAINT**

16 The Estate seeks to add Jarose as a plaintiff in her individual capacity and to add a
17 claim against the County for violation of the CWA. The request is based on information
18 purportedly “discovered for the first time” at Seemann’s deposition, i.e., that the County
19 has not obtained a permit to discharge water from the courthouse sump system. Mot. at 6.
20 The Estate asserts that the discharge of water into Humboldt Bay without a National
21 Pollution Discharge Elimination System (“NPDES”) permit violates the CWA, thus giving
22 rise to a cause of action thereunder. Although not discussed in the motion, the Estate seeks
23 to add Jarose as a plaintiff in her individual capacity to avoid any challenge to its standing
24 to bring a citizen suit to enforce the CWA. See Reply at 6. According to the Estate, it
25 could not have sought leave to add the proposed claim for violation of the CWA prior to the
26 deadline to amend the pleadings “because [the fact that the County operates its sump
27 system without an NPDES permit] was unknown to [it] at that time.” Mot. at 6.
28

1 The County opposes the motion on several grounds. As an initial matter, it argues
2 that the Estate has not demonstrated due diligence in pursuing the CWA claim, and thus,
3 has failed to establish good cause to modify the scheduling order. The Court agrees.³

4 The Estate has not shown that the deadline to amend the pleadings could not
5 reasonably have been met despite its diligence. At this stage of the proceedings—where
6 the Estate has already been granted leave to file a first amended complaint and a pretrial
7 schedule has been entered—it is incumbent upon the Estate to develop whatever facts may
8 be necessary to pursue potential claims of which it has notice. A party cannot simply wait
9 for facts to present themselves in due course. Here, the Estate has always alleged that the
10 County illegally discharges water from the sump system into the storm drains and
11 Humboldt Bay. Comp. ¶¶ 16-17 (“Plaintiff is informed and believes, and on that basis
12 alleges that the County illegally released, discharged, and/or disposed of contaminated
13 water to and from the storm drain system[,]” and that “the storm drain system flows toward
14 Humboldt Bay without pretreatment.”); FAC ¶¶ 19-20 (same). The Estate was therefore on
15 inquiry notice of the newly proposed CWA claim since at least December 2018.

16 The Estate argues it was under no obligation to “prove a negative” by verifying—
17 prior to taking Seemann’s deposition—that the County has no NPDES permit. Reply at 4.
18 If such information is available, however, that is indeed the Estate’s obligation. See
19 Johnson, 975 F.2d at 610 (“The burden was upon [Plaintiff] to prosecute his case
20 properly.”). As to the availability of the information testified to by Seemann, the County
21 asserts that “[its] permit status would be a matter of public record.” Opp’n to Second Am.
22 Compl. at 4. The Estate claims otherwise, asserting that “[t]here is no database listing of
23 permit-holders relating to point source discharges[.]” Reply at 4. The Estate is incorrect.
24 The Court takes judicial notice of the fact that NPDES permit data is publicly available on
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26 ³ The County further argues that, even if good cause were shown, leave to amend
27 should be denied because the proposed amendment is futile and would prejudice the
28 County. Given that the Court finds no showing of good cause, it does not reach the
County’s other arguments. Consequently, the County’s request for judicial notice—which
goes to the issue of futility—is DENIED as moot. Dkt. 36-1.

1 the websites of both the EPA and the California Water Board.⁴ Thus, the Court finds that
2 the Estate’s ignorance as to the County’s permit status was attributable “entirely to [the
3 Estate’s] own lack of diligence.” Opp’n to Second Am. Compl. at 4.⁵

4 Because the Estate has not demonstrated due diligence, the Court does not address
5 the County’s arguments regarding futility and prejudice. The Court notes, however, that a
6 citizen suit for violations of the CWA differs in nature from the instant action and that the
7 proposed CWA claim is not essential to the resolution of the instant dispute. In other
8 words, whether the County is violating or has violated the CWA does not help to assign or
9 apportion liability between the County and the Estate as to the cleanup of the Subject
10 Property and any plume originating therefrom.

11 In view of the foregoing, leave to file a Second Amended Complaint is DENIED.

12 **B. PROPOSED AMENDED ANSWER**

13 The Estate seeks to add an affirmative defense of accord and satisfaction. The
14 request is based on information purportedly “discovered for the first time” at Seemann’s
15 deposition, i.e., that the County released to Braun the funds set aside under the Judgment
16 for cleanup costs. Mot. at 8. The Estate asserts that the defense is “appropriately raised
17 under these recently discovered facts.” *Id.* According to the Estate, “Jarose . . . has limited
18 knowledge of the transactions between the County and Mr. Braun during his life,” and thus,
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20 ⁴ The EPA’s website states that users can utilize the Enforcement and Compliance
21 History Online (“ECHO”) site to “search by your location to find NPDES permitted
22 facilities near you.” See <https://www.epa.gov/npdes/npdes-permit-basics>. An embedded
23 link directs users to <https://echo.epa.gov/>. The California Water Boards’ website states that
24 users can “[s]earch for NPDES permits” using its Interactive Regulated Facilities Report.
25 See https://www.waterboards.ca.gov/water_issues/programs/npdes/permit_serach.html.
26 Pursuant to Federal Rule of Evidence 201, information made publicly available on the
27 website of a government agency is subject to judicial notice. See *Daniels-Hall v. National*
Educ. Ass’n, 629 F.3d 992, 999 (9th Cir. 2010) (taking judicial notice of information made
28 publicly available on the websites of two school districts); *U.S. ex rel. Modglin v. DJO*
Glob. Inc., 48 F. Supp. 3d 1362, 1381 (C.D. Cal. 2014), *aff’d sub nom. United States v.*
DJO Glob., Inc., 678 F. App’x 594 (9th Cir. 2017) (taking judicial notice of documents
made available on the websites of the FDA, CMS, SEC, and Medi-Cal).

⁵ The Court notes that Plaintiff could have also propounded written discovery
regarding the County’s permit status to discover this information.

1 it could not have sought leave to add the defense prior to the deadline to amend the
2 pleadings “because the information was unknown to Plaintiff at that time.” Id.

3 The County opposes the motion, arguing that Plaintiff has not shown good cause.
4 The County notes that the motion is “entirely lacking in evidence about what, if anything,
5 Ms. Jarose knew about retained funds, release of retained funds and/or whether she
6 possesses any records of John R. Braun on the subject.” Opp’n to Am. Answer at 3. The
7 County avers that “[e]xtensive correspondence exists over the period 1993-2018 between
8 John R. Braun and the County and others including on the subject of retained funds, release
9 of funds and substituting various forms of security.” Horan Decl. ¶ 11, Dkt. 35-1. The
10 County avers, “[o]n information and belief,” that this correspondence “would be in the
11 records of John R. Braun.” Id. According to the County, without information as to what
12 the Estate knew or had access to in Braun’s records, the Court cannot evaluate whether it
13 exercised due diligence in discovering the proposed defense. Opp’n to Am. Answer at 3.

14 The Estate counters that the transaction in question was between the County and
15 Braun, who is now deceased. Reply at 3. The Estate asserts that the issue “came up” at
16 Seemann’s deposition, and that, according to his testimony, not even the County could
17 confirm with certainty the circumstances under which the funds had been released. Id. The
18 Estate notes that it conducted significant third-party discovery “to obtain the historical
19 records, invoices and other documents relating to the claims and defenses in this case.” Id.
20 at 3 n.1. It contends, however, that “[e]ven if [this information] were part of the
21 voluminous historical records, there was no reason for Plaintiff to suspect the defense until
22 it was raised and confirmed at deposition.” Id. at 3.

23 The Court finds that the Estate has not demonstrated due diligence in raising the
24 defense of accord and satisfaction. The Estate notes that it conducted discovery to obtain
25 historical records and summarily asserts that those records are “voluminous.” However, the
26 Estate provides no detail as to: (a) the approximate number of documents; (b) its efforts, if
27 any, to review and search the records; or (c) whether information regarding the released
28 funds is actually contained therein. In fact, even though the County raises the issue in its

1 opposition, the Estate provides no information whatsoever about the information known or
2 available to it prior to Seemann's deposition. The Estate relies entirely on its purported
3 diligence in moving to add the defense once information came to light, but it makes no
4 showing as to its efforts to pursue available defenses, including the defense of accord and
5 satisfaction, prior to the deposition.

6 In view of the foregoing, leave to file an Amended Answer is DENIED.

7 **IV. CONCLUSION**

8 For the reasons stated above, IT IS HEREBY ORDERED THAT the Motion to
9 Modify the Scheduling Order and for Leave to Amend the Pleadings is DENIED. This
10 Order terminates Docket 31.⁶

11 IT IS SO ORDERED.

12 Dated: 3/2/2020


SAUNDRA BROWN ARMSTRONG
Senior United States District Judge

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27 ⁶ The Estate notes that the County has raised the issue of staying the action. Reply at
28 5. To date, no motion has been made seeking a stay. In the event that the pretrial schedule
is later vacated because of a stay, the matter of amending the pleadings may be revisited.